IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 733.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, a corporation,

Petitioner,

versus

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA,

Respondents.

REPLY BRIEF OF PETITIONER.

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FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, AND CITY OF BATON ROUGE, LOUISIANA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

Statement.

In the Commission's brief issue is taken with the manner in which petitioner has stated the questions for determination by this Court. The facts are clear and undisputed that gas is produced and purchased by petitioner in the Monroe Field; that such gas is moved through pipe lines by the natural pressure of the wells to the points of delivery within the Monroe Field; that such movement takes place through, and delivery is made from, the field pipe line gathering system of petitioner; that each purchaser receives the gas, commingles it with gas received from other pro-

ducers in the Monroe Field and then passes the gas through scrubbers to remove dirt and other solids; and that the gas is then compressed by the purchasers in order that it may be moved from Louisiana to the States of destination. Petitioner believes it has fairly and fully presented all essential points. It does not agree with the statement in the Commission's brief that gathering of this gas has been completed and that it is transported in interstate commerce after gathering and before sale to the pipe line purchasers. That is one of the points for decision by this Court.

In the main, the statements of fact about petitioner's operations are accurate. We wish to point out specifically that the gas sold and delivered by petitioner to the three pipe line companies does not move through the DeSiard Compressor Station and is not compressed at that station, but that such gas moves solely by reason of the natural pressure of the wells in the field. We point this out initially since the description in the Commission's brief of the movement of gas other than that involved here, traces it into the compressor station. In other instances the gas is described as coming to the premises of the DeSiard Station, referring to the land surrounding the compressor station buildings (Commission's brief, pp. 7, 9, 17, 29, 31). We do not agree with the use of the term "transports" or "transportation" as a description of the movement of the gas by petitioner if by the use of that term there is meant a jurisdictional transportation movement.

It is important to point out that the complaint of the Louisiana Public Service Commission referred to in the Commission brief (p. 3) did not allege that the prices charged for the gas here involved were unreasonable nor did it ask that rates for these field sales be fixed by the Federal Power Commission.

That complaint sought an investigation into the rates charged by petitioner for gas sold to public utilities and municipalities in Louisiana from petitioner's main transmission line after passing through the State of Mississippi and back into Louisiana. It was alleged that the business of petitioner was both intrastate and interstate, that the Louisiana Commission had jurisdiction over the intrastate part and the Federal Power Commission over the interstate part; furthermore

> "that it is necessary for the proper and effective regulation of local gas distributing utilities in Louisiana that such proper rates or gate prices of natural gas for resale be determined, as provided for in Sections 5(a) and 17 of the Natural Gas Act of 1938" (see also paragraphs 4, 11 and 12, of the complaint, R. I, 25, 34).

The comments in the Commission brief about the answer of petitioner to that complaint are not supported by the record. It is necessary to have these matters, seemingly unimportant, accurately stated because of the unjustified contentions later made about the litigation between petitioner and the Louisiana Commission. What the answer states about that litigation is found in the Record, Vol. I, commencing at the bottom of page 39 and ending at the top of page 41.

The order of the Louisiana Commission (R. I, 507-518) against which an injunction was sought referred to the sales made for ultimate consumption in Louisiana, stated that the Louisiana business was of "great concern" to the Louisiana Commission, found that petitioner was a public utility subject to its jurisdiction and ordered access to petitioner's books to determine reasonable rates and charges for gas "transported or sold in intrastate com-

merce in Louisiana" (R. I, p. 518). The principal contentions of petitioner were that it was not a common carrier and was not a public utility under the Louisiana law (R. II, pp. 849, 861; see also complaint of Louisiana Commission, R. I, 25, order of Louisiana Commission, R. I, 508). The allegations as to the interstate character of its business were added as a further limitation on the power of the state commission over the business of petitioner.

That the sales now in litigation were not the subject of the Louisiana Commission's complaint was recognized in the order[1] of the Federal Power Commission expanding this proceeding to a general investigation of all of petitioner's rates and charges subject to the Power Commission's jurisdiction.

That part of this rate case which the Louisiana Commission started by its complaint was finished and the rates so fixed by the Federal Power Commission were accepted by petitioner. Consequently whatever controversy existed with the Louisiana Commission did not deal with the sales to these interstate pipeline purchasers. That commission did not attempt to fix the rates for the sales here involved and the effort of the Power Commission to make it so appear (Commission brief, pp. 16, 19, 24) is not supported by the

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[1] "(a) On May 23, 1939, the Louisiana Public Service Commission, a State commission within the meaning of the Natural Gas Act, filed with the Commission a complaint (Docket No. G-132) which alleges, in substance, among other matters, that the Interstate Natural Gas Company, Incorporated, is engaged in the transportation of natural gas in interstate commerce and in the sale of natural gas in interstate commerce *for resale in Louisiana*, and that its rates and charges for such transportation and sale are unjust and unreasonable, and requests the Commission, after a hearing, to fix the just and reasonable rates to be thereafter observed and in force in respect of such transportation and sale;" (Emphasis supplied) (R. I, 50).

record. A fuller discussion of the Louisiana litigation will later be made.

Considerable discussion relates to so-called affiliations between petitioner, the purchasers of gas, and other producers in the field. Mention of this is irrelevant and relates only to contract relationships between the parties involved. The Commission made no findings whatsoever as to affiliation except as to one purchaser (Mississippi River Fuel Corporation), and referred to "'close contractual and operating arrangements'' between petitioner and United Gas Pipe Line Company. As will be pointed out later, we believe that these facts are not of significance in determining whether Congress has given the Commission regulatory authority over the sales in question. It should be observed that the ownership of stock in a corporation does not constitute such owners as affiliates, as that term is used when courts inquire into the fairness of dealings between affiliates. Nor could contractual or operating arrangements serve to confer jurisdiction over the parties thereto unless the statute specifically so provided. Moreover the only stock affiliation was that existing with reference to Mississippi River Fuel Corporation, and such affiliation went no further than a minority interest (22½%, R. I, 412) owned therein by a corporation which owned a majority interest (53.9%, R. II, 707) in petitioner.

The "Production or Gathering" exemption of Section 1(b) of the Act.

While the Commission heretofore in this proceeding has contended that a sale of natural gas by a producer or gatherer is not encompassed within the protective exclusion

of the "production or gathering" clause of Section 1(b) of the Act, it now departs slightly from that extreme position. No longer does the Commission claim that the exemption relates *solely* to the physical activities of production and gathering.[2] It now admits that a field sale of a restricted character is excluded from its jurisdiction under certain conditions laid down by the Commission although not found in the Act.[3] These conditions are:

1. The sale is at "arm's length".

2. The seller is not otherwise a "natural-gas company".

3. The sale "is closely connected with and a part of local gathering".[4]

The Commission affirms its claim of jurisdiction over the particular sales in question by the following points:

1. Prior to the sales in question the activity of "gathering" ended and transportation in interstate commerce, within the meaning of the Act, took place. Such sales, therefore, were made "in interstate commerce" (Commission brief, pp. 29-33).

2. Even if the gas were not transported in interstate commerce, within the meaning of the Act, prior to the sales, nevertheless the gathering had been com-

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[2] This contention of the Commission was adopted by the Circuit Court, which held broadly that such exemption did not apply to sales (R. II. 914, 915).

[3] See Commission brief, pages 26, 34, 43, 44, 45.

[4] However, a sale made to an interstate pipe line which commences the trunk line interstate transportation is said to be made "after the completion of gathering," and thus is not within the exemption. A sale to be exempt apparently must be from one gatherer to another gatherer, in the process of gathering, and thus be a "part of local gathering" (Commission brief, pages 34, *et seq.*

pleted at the point of sale and so the sale is subject to regulation, being a sale "in interstate commerce" (Commission brief, pp. 34, 35).

3. Petitioner is otherwise a natural-gas company, and, therefore, all sales to interstate pipe lines for resale are regulable whether or not made as a part of production and gathering (Commission brief, pp. 35, 40, 43).

4. Petitioner and Mississippi River Fuel Corporation have corporate affiliations, and Petitioner and United Gas Pipe Line Company have "close contractual and operating arrangements" (R. I. 59; Commission brief, pp. 35, 40, 43; See also discussion Commission brief, pp. 11-14, although not reflecting findings of the Commission concerning affiliation).

Not a single point relied upon by the Commission supports its claim of jurisdiction as a brief discussion will demonstrate.

1.

The Contention That Petitioner "Transported" Gas After Completion of Gathering and Prior to Sale.

There is no dispute about the actual facts of Petitioner's operation. Stripped of all statutory terminology, and the use of labels to support the legal conclusion of jurisdiction, the gas produced and purchased by Petitioner moves from the producing wells through a series of pipe lines in the field in a continuous stream and without interruption, to the three points of delivery where the interstate pipe line companies take possession and do the things necessary to prepare the gas for its interstate journey. We will not repeat the de-

scription recited in petitioner's brief, pages 3, 4, 5, 44, 45 (note 8) and 46.

The Commission's brief states as a purported finding of "fact" the things that are in legal dispute and are presented for the decision of this Court. At the outset the Commission's brief characterizes certain field lines as "trunk pipe lines" (Commission's brief, pp. 2, 8, 29). Such phraseology has no specific significance. Such lines are not transmission lines. The Engineering and Accounting Staff in its testimony deemed these lines as field lines and so they are gathering lines under the Commission's own classification (Petitioner's brief, p. 24). Calling these field lines "trunk lines" doesn't negative their use as pipe lines in the gathering of gas within the meaning of the Act.

The finding of the Commission, as interpreted in its brief, is that petitioner's produced gas was completely gathered and then was commingled with gas purchased from other producers who had completed the gathering of their gas. From this point, stated to be the premises of the DeSiard station, it is claimed that the gas was "transported" to the points of sale in the Monroe Field. This finding is not merely one "as to the facts" (See Section 19b of the Act). It is a legal conclusion of the Commission's jurisdiction based upon the Commission's interpretation of the admitted facts and the statutory requirements.

The Commission's brief (p. 30, note 7) apparently urges that these findings that petitioner transported gas in interstate commerce prior to its sale in some way are binding on petitioner. The statute states that:

> "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive" (Section 19(b)).

The facts here are not disputed; the application of the statute to those facts by the Commission is here for review.[5]

The Commission would limit the activity of "gathering" solely to the removal of gas from several wells to the first common point of commingling. Based upon this restricted meaning the conclusion is urged that the end of gathering the gas had taken place "at least when it reached the premises of petitioner's DeSiard compressor station • • •" (Commission's brief, pp. 31, 33). This restricted meaning is not justified by the Natural Gas Act (Sec. 1(b)) wherein the disjunctive "or" is used to extend the exemption to either the function of producing or the function of gathering. Such a restricted meaning of "gathering" also is not in accordance with the use of the term in the trade or in any publication or in any decided case (see Petitioner's brief, pp. 14-23).

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[5] In footnote 7, page 30, the Commission's brief alleges the failure of Petitioner specifically to urge the absence of substantial evidence to support the Commission's findings. Such does not need to be stated. If an objection to the order is made, the lack of substantial evidence is a rule to guide the Court in considering the findings on the facts. Here we are dealing with limitations upon the jurisdiction of the Commission and its ultimate findings based on the application of law to the facts are in no sense conclusive.

Under the American constitutional system, powers may be exercised by administrative agencies only "within the scope of the delegated authority" under which they purport to be exercised (*Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470 (1910)). Courts customarily determine whether, in interpreting or applying statutes, an administrative agency has "applied the proper criterion", its basis of judgment "is erroneous as a matter of law" or whether "there is no statutory sanction for such a procedure" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 483, 488, 486 (1942); *Howard Hall Co.* v. *U. S.*, 315 U. S. 495, 499).

An excellent statement of the judicial function in jurisdictional matters is found in *Stark* v. *Wickard* (321 U. S. 288, 310 (1944)) as follows:

> "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function

The Commission has failed to cite a single authority or reference that supports its limited or restricted views. No answer whatsoever is attempted to the undisputed testimony of Commission's staff witnesses, all of whom classify these lines as gathering and not transmission lines (Petitioner's brief, pp. 24-28) and of the staff's recent report on this subject (Petitioner's brief, p. 29).

Although without particular significance, the statement that:

> entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. * * * This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

In passing upon certain specific authority of the Interstate Commerce Commission, this Court has held that the authority of an administrative agency to pass upon jurisdictional language, or the definitions of a statute, is merely "incidental" to its functions of passing upon the administrative questions delegated to it by the statute. "The [Interstate Commerce] commission for the purpose of determining whether it is authorized by the Act to consider the merits, may pay incidentally upon the question whether the project [extension or new construction of a line] is one covered by [the statute requiring approvals of the Commission for such extensions or new construction]. But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit * * * to enjoin a violation of [the statute]. The function of the court is to construe that paragraph; that of the commission is to determine whether the project, if it is one covered by the paragraph, is in the public interest" (*Powell* v. *U. S.*, 300 U. S. 276, 287 (1937)).

The question here is the correct application of the law to the admitted facts.

> "'All the gas sold to the three pipe line companies (except for that delivered by Southern Carbon at Meter 128-P) is brought to the premises of the DeSiard station before being transported to the point of delivery to the three purchasing companies'',

is not an exact statement of the facts (Commission's brief, p. 32). For example, lines F-45 and F-44 go around the compressor station (R. I, 182, 187, 188). The maps attached to the Commission brief as Appendices A and B are not correct representations of the layout of pipe connections in the vicinity of DeSiard station. Appendix B is not in the record and shows all lines running into DeSiard station, from which it could be assumed that all gas produced and purchased by petitioner is compressed by the machinery in that station. This is not the fact. These pipe lines run through the yard surrounding the compressor station, referred to in the Commission brief as the "premises" of the DeSiard station. (See Exhibit 43, Map, R. II, 599; photograph, R. II, 596, which shows the station itself and surrounding yard.) We must restate that the gas sold to the three pipe line companies is not compressed by petitioner and moves to the points of sale under natural pressure. The gas is not all brought into one place and commingled prior to its delivery to the three points of sale. It flows through the various field lines until the particular gas destined for the three points of delivery moves into the lines which connect with the meters through which the gas is measured to the purchasers. Only when delivered to the purchaser has "gathering" ended.

The attempt to distinguish the gathering of oil from that of gas (Commission's brief, p. 31, note 9) emphasizes the correctness of petitioner's position. In the case cited by petitioner, the Caminol Company's oil had been brought

through the "small lateral or feeding lines to a larger pipe line and thence, for a distance of slightly more than two miles, to its refinery" (Petitioner's brief, pp. 18-19). The gathering operation was held not to end until delivery at the refinery where the oil was refined. "All the oil in question was transported in uninterrupted movement from the place of production to that of refinement" (Petitioner's brief, p. 19). The movement of oil there held to be "gathering" is similar to the movement of gas through Petitioner's lines F-1, F-33a, F-44, F-45 and F-43 to the points of delivery. The whole purpose of the uninterrupted movement from the place of production or purchase is to get the gas to these three purchasers.

The gathering of gas which is compressed at DeSiard station for transportation through Petitioner's transmission line T-1 to Baton Rouge naturally ends when delivered into the compression machinery. The *function* of the gathering has then been completed. Gas which goes by the premises of DeSiard compressor station has not been gathered *functionally* until delivered to the compressor stations of the three pipe line purchasers. Consequently, the geographical location where the gathering of the Baton Rouge gas ends is not the geographical location of the points where the gathering of other gas ends. When gas moves from the DeSiard station compression machinery, it is commencing its interstate journey to Baton Rouge in the same manner as gas moving from the compression machinery of the three purchasing pipe line companies. This difference is the distinguishing factor which the Commission's brief fails to comprehend (Commission's brief, p. 33), namely the functional purpose of gathering the gas.

2.

Unreasonable Results from the Commission's View of the Gathering Activity.

If the interpretation and definition of "gathering" urged by the Commission were to be established and applied to the Monroe Field, many producers in that field would be subject to price regulation by the Federal Power Commission and many others would not. If producer "A" owns ten wells in the extreme westerly part of the field the gathering of his gas would be completed as soon as each of the smaller field lines had delivered gas into a larger (arbitrarily by Commission counsel denominated a "trunk") field line. If that producer, in order to sell his gas, had to move it to the compressor station of any of these three pipe line purchasers, then such sale would be regulable under the Commission's view. If that producer moved his gas part of the distance to the point of delivery to the purchaser after the last well line connection with the trunk field line, then such movement, under the Commission's interpretation, would be transportation in interstate commerce. The only producer who could be certain of freedom from regulation would be one who sells at the well mouth.

Notwithstanding that all such movement would be within the limits of the producing field and would extend no further than the place where the purchasing interstate pipe line begins its preparation of the gas for its subsequent transmission to other states, yet the specific character of this movement within the producing field would determine whether a producer and gatherer is to have his gas price fixed under the utility concept of Federal Power Commission regulation. If the purchasing pipe line company extends its own lines from its compressor station out into

the field and takes delivery of gas at each point where the gas from a group of wells is brought to a central point, then such sales would not be subject to regulation. However, if the purchasing pipe line company established one or more central points in the field to which producers are to bring their gas, then the Commission would find that such movement, whatever the distance, constitutes transportation of natural gas in interstate commerce within the meaning of the Act.

If this restricted viewpoint of gathering were to be applied to producers in the State of Texas, the producers which would be free from the regulatory control of the Commission would be few indeed. The protestations of the Commission in its brief, that it has never sought to extend its jurisdiction over sales of natural gas made by independent producers and gatherers, has little meaning if the Commission is to follow a concept of gathering which limits that activity to the movement of gas from the well to the first point of commingling. The producing fields in Texas encompass a large area. This Court has dealt with matters involving the Panhandle field in Texas which is approximately 120 miles long. It is customary in that field, as well as in other producing fields in Texas, for the producer to tie his wells in to his own gathering system and then move the gas to a central point where delivery is taken by the purchaser. In many instances the distance from the last well line to the point of delivery to the purchaser may be several miles. That such is the intent and purpose of the Commission is evidenced by the statement in its brief that the sale may be exempt from regulation where "the sale is closely connected with and a part of local gathering" (Commission's brief, p. 34).

Actually the Commission's position as evidenced in the brief, Part II B, would make every sale by a producer regulable unless made at the well mouth or made *prior* to the completion of the gathering activity. Gathering by the producer of necessity must end when delivery is made to the compressor station of an interstate pipe line purchaser. Such a sale, argues the Commission, is not under the exemption of production or gathering. Accordingly, to be exempt a sale would have to be made before physical possession were taken by the purchaser and title would have to pass at some point in the gathering system of the producer and gatherer (see Commission's brief, pp. 34, 35), or the purchasing pipe line would have to own a part of the gathering system. Such an interpretation is clearly contrary to the Act and to every concept of gathering held in the industry, in books written on the subject and in decided cases. To follow it would be a continuation of the misconception of the intention of Congress. Could Congress possibly have intended an interpretation under which jurisdiction depends upon the location of the producer's wells in the field? Is it reasonable that Producer A whose wells are ten miles from the pipe line receiving station be compelled to sell his gas on a cost of investment basis, and Producer B whose wells are all close by the receiving station be allowed to charge a negotiated price? Can the rationale of regulation be dependent upon geographical location of the wells in a large producing field? Such unreasonable results negate an interpretation that produces them.

The movement of gas within the limits of a single producing field in a single State is not the character of transportation of natural gas which Congress sought to regulate. The reports of the House and the Senate Committees make no mention of transportation within a producing field

in describing the activities intended to be reached by the Bill. Reference is made to sales by a producing company to a distributing company, and the cases of *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam and Electric Company*, 273 U. S. 83 are given as instances of the type of transportation and sale to be regulated. The limitation of Section 1(b) that the Act "shall not apply to any other transportation or sale of natural gas" adds emphasis to the exemption given production or gathering. Not only is the movement up to the point of sale a gathering activity, but it clearly is "other transportation" as distinguished from the interstate movement contemplated by the Committee reports. That the actual interstate transportation of the gas begins after it passes through the compression machinery of the purchasers is emphasized by the things which each purchaser must do to the gas before it can move out of Louisiana (Petitioner's brief, pp. 4, 5). The pressure at which the gas is delivered to the pipe line will not move the gas out of Louisiana at the required rate of flow or volume. It must be brought up to higher pressure. One cubic foot of gas delivered by petitioner occupies only ⅓ cubic foot when it leaves the pipe line compressors. The reduction of pressures by the local distributing company has been likened to the breaking of the package which signifies the end of the interstate movement—*East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465. Likewise the increasing of pressure upon the gas by the pipe line company signifies the making up of the package which is the last step in the preparation for the interstate movement of the packaged gas. Petitioner, as well as the other suppliers of the pipe line companies, brings unpackaged gas to the place where the package is

made up for shipment. This movement is "other transportation" than interstate transportation as contemplated by the Act; and the sale there made is an "other sale" to which the Act is not to apply.

3.

The Commission-Enacted Rules of

(a) Otherwise a Natural-Gas Company; and

(b) Affiliation Between Seller and Purchaser

No authority in the Act, in its legislative history, or in any court decision, can be cited in support of the Commission's contention that the sales here made are regulable just because petitioner is a natural-gas company by reason of other activities subject to regulation. That a natural-gas company under the Act may engage in sales of gas not subject to the Commission's jurisdiction has been recognized and stated by this Court. Such nonjurisdictional activities continue exempt from Commission control and regulation. *Panhandle Eastern Pipe Line Company* v. *F. P. C.*, 324 U. S. 635, 641-642; *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581.

The test of the validity of Commission regulation is not the character of the general business of the Company but whether the particular activity sought to be regulated is within the lawful limits of the statutory authority granted the Commission.

Likewise, the existence of some type of "affiliation" between the seller and purchaser, whether by virtue of stock ownership or by reason of long contractual relationships, is not stated in the Natural Gas Act as a basis for jurisdiction. The discussion in the legislative history concerning affiliation merely deals with the well established prin-

ciples of rate fixing wherein the regulatory authority might disallow as an operating expense some part of the cost of gas purchased from a corporate affiliate. *United Fuel Gas Company* v. *Railroad Commission*, 278 U. S. 300, 320; *Western Distributing Company* v. *Public Service Commission*, 285 U. S. 119; *Dayton Power and Light Company* v. *Public Utilities Commission*, 292 U. S. 290. In each of those cases the affiliation was by reason of 100% stock control of the seller and buyer by a single corporation.

The authority of a regulatory body under those decisions does not extend to a direct regulation of the price actually received for the gas by the affiliated vendor. If there is no direct authority to regulate, then the fact of affiliation does not confer it. In any event, the only purchasing pipe line company whose stock is owned in part by one of the stockholders of petitioner is Mississippi River Fuel Corporation. In the other pipe line companies, petitioner has no financial interest or control. Affiliation is of no consequence in the case of Mississippi River Fuel Corporation since the evidence, by comparison with rates charged to the others (R. II, 558), shows clearly that prices charged to that alleged "affiliate" were not the result of over-reaching. The absence of such over-reaching certainly is tantamount to arm's length bargaining on the only matter material here—the rates.

The attempt of the Commission to differentiate between a sale which "is closely connected with and a part of local gathering" (Commission brief, p. 34) and a sale made directly at the end of and as the final step in the gathering movement, is without merit. The impact upon production and gathering is the same whether the sale and transfer of title, possession, and control take place at the end of the gathering line or 100 feet before such end. In either event the sale is an essential part of the gathering activity with

out which gathering could not take place. When the sale and delivery of gas is made to an interstate pipe line, the gathering process by the seller always will end concurrently with the sale. If the distinction urged by the Commission were to be followed, then sales by producers would be limited to well mouth transactions and the exemption accorded to gatherers of gas by the statute would be nullified.

Are the sales in question transactions in Interstate Commerce?

At three places in the Commission's brief reference is made to the case of *Interstate Natural Gas Company* v. *Louisiana Public Service Commission,* 34 F. Supp. 980 (E. D. La.). That case is characterized as an attempt to free the sales in question from State regulation on the ground that such sales were contended then to be transactions in interstate commerce. A quotation from a part of the petition for an injunction is cited, and *there is an artful attempt to make that case appear as dealing solely with an attempt by the Louisiana Commission to regulate the price of the sales here involved and nothing more.* The treatment given this case in the Commission's brief not only fails to describe the complete situation before the District Court but attempts to make the case appear as something other than it actually is. Accordingly, it is necessary to recite the facts of that proceeding, the issues involved, and what the Court actually held.

The action was to prevent a general investigation of all of petitioner's business by the Louisiana Public Service Commission, which purported to proceed under statutory authority giving it jurisdiction over *public utilities engaged in intrastate activities in Louisiana.* That Commission was

interested in gas that was consumed in Louisiana, and the principal contention made by petitioner was that under the Louisiana Law the Public Service Commission had jurisdiction only over intrastate public utilities or common carriers and that its activities did not constitute it either a public utility or a common carrier (R. II, 849, 861). *There was no statute purporting to give the Louisiana Commission authority over sales of gas not consumed in Louisiana.*

Petitioner also showed that its sales of gas to local utilities for distribution to the public in Louisiana were made almost entirely after the pipe line passed through the State of Mississippi and then re-entered Louisiana, and so were sales in interstate commerce (R. II, 860). Only a small quantity of gas was delivered in Louisiana prior to the pipe line entering Mississippi. The sales to the pipe lines in the Monroe Field were characterized as being made for transportation in interstate commerce and sale outside Louisiana, and so could not be under the statutory authority of the Louisiana Commission. Actually the State Commission could have no interest in those sales since no consumer in Louisiana ever received any of that gas.[6]

A preliminary injunction was denied, notwithstanding petitioner's contentions with respect to all of its business, and even though the Court said:

> "It is true that the Louisiana statute appears to apply only to *public utilities operating in intrastate commerce*, but it would seem that the Commission should be permitted, regardless of any express authority with respect to affiliates, to make investigation of and require information from concerns such as Plaintiff, with respect to its *dealings with local utilities serving the public*, when the monopo-

[6] The title of the state proceeding was: "*In re:* Rates, charges and practices for gas service within the State of Louisiana (R. I, 25, 508).

> listic character of the gas business is such that its price may be fixed by complainant according to its own views and would be governed, no doubt, by what 'the traffic would stand' " (Emphasis supplied) (33 Fed. Supp, 50, p. 59).

Observe that the Court is concerned with the sales to local utilities and not to the interstate pipe lines.

Upon final hearing no additional evidence was adduced, and only petitioner filed a brief. Probably the failure of the Public Service Commission to contest the matter was its filing of a complaint in the meantime with the Federal Power Commission, which resulted in a reduction in rates to the local utilities served by petitioner,—rates accepted by petitioner and not in contest here.

The facts considered by the Court were based on a stipulation describing all the various activities and sales of petitioner at length, among others being the sales here involved.

On the basis of all the facts, the Court said:

> "In view of these facts, we are constrained to hold that the complainant is not a public utility or a common carrier pipe line, and that 99.83% of its gas is sold and moves in interstate commerce" (34 Fed. Supp. 980 at 981).

It is clear that the Court was concerned primarily with the status of petitioner as a local public utility selling gas for resale to the public, and the sales made by petitioner in the Monroe Field were simply lumped together with the gas transported and sold through Petitioner's interstate pipe line. Since the Louisiana Commission was not seeking jurisdiction over the field sales alone, but was starting upon a complete investigation of all of petitioner's activities that affected the sale of gas to consumers in Louisiana, the exact

status of the particular sales here involved was not essential to the decision enjoining the proposed broad investigation. There was no necessity of studying in detail the exact character of those sales. The real basis of the holding is that petitioner was not a local public utility under the Louisiana law which fixed the jurisdictional limits.

At the 1946 session of the legislature of Louisiana, Act No. 373 was passed conferring upon the Louisiana Commission authority over the intrastate transportation and sale of natural gas to local distributing systems for resale within the State of Louisiana. This statute gives authority to the Louisiana Commission not held by it when petitioner filed its injunction suit. A proceeding has now been instituted by the Louisiana Commission against petitioner, being Case No. 4607, instituting inquiry as to intrastate sales to distributing companies of gas for resale within the State of Louisiana. However, this recent statute does not purport to give any authority to the Louisiana Commission over the field sales here involved since this gas is not transported or sold to local distributing companies for resale within the State. Until statutory authority is given to the State Commission, it could not have regulatory power over these sales, and this petitioner did nothing more in the case under discussion, and seeks to do nothing more here, than to prevent both State and Federal Commissions from exercising regulatory authority not conferred by statute.

Petitioner has consistently averred the general lack of jurisdiction over the sales in question (Petition for Rehearing Before the Commission, R. I, 94, 97). In its review petition a general lack of jurisdiction is likewise alleged (R. I, 15-17). The fact that petitioner sought to reply principally on the production or gathering clause as a basis for a lack of jurisdiction does not limit its general right under the Petition for Review presented to the Circuit Court

of Appeals. It is, of course, beyond petitioner's power to confer jurisdiction upon the Commission if as a matter of fact and law the sales are not within its statutory authority.

The Commission relies principally on *Currin* v. *Wallace* (306 U. S. 1) and similar cases wherein the question involved was the right of the Federal Government to impose regulations upon local transactions because of their effect on commerce. If the transaction here in question properly is a sale in interstate commerce requiring national treatment then it is one which is beyond state authority to control. We submit that under the recent cases of this Court such as *Milk Control Board* v. *Eisenberg Company* (306 U. S. 346) a sale of a product for direct and immediate transportation outside of the state is subject to the regulatory processes of the state. Certainly such transactions can be regulated by the Federal Government and there is no contention here that these sales could not be placed under the jurisdiction of the Commission by Congress. None of the cases dealing with natural gas transactions have been based upon the question of a sale made under the circumstances such as these now presented. In *Missouri* v. *Kansas Natural Gas Company* (265 U. S. 298) the sales were made after the transportation beyond the state of production. In *Public Service Commission* v. *Attleboro Steam and Electric Company* (273 U. S. 83) the sale was made at the state line after transportation from the electric generating plant. In *Peoples Natural Gas Company* v. *Federal Power Commission* (127 F. 2d, 153, cert. den., 316 U. S. 700) the interstate commerce question revolved about sales made after compression at a compressor station of the seller and without any finding as to source of the gas, any reference to Section 1(b) of the Act and any determination as to whether or not the seller had transported the gas prior to its compression and sale. Actually all that the

Peoples case decided was that the allegations in the petition for the issuance of a subpoena *duces tecum* were sufficient and that the subpoena should issue.

Conclusion.

In presenting to the Court the question of jurisdiction of the Commission over the sales to Mississippi River Fuel Corporation, Southern Natural Gas Company and Memphis Natural Gas Company, of gas produced and purchased in the Monroe Field, Louisiana, moved through pipe lines of the petitioner within the limits of that field, delivered by the natural pressure of the wells and without any compression whatsoever to the points of sale, petitioner has described an activity typical not only in the Monroe Field on the part of all producers who gather and deliver gas to the pipe lines radiating from that field, but typical throughout the producing fields of the Southwest. Gas is produced, is taken through well lines to trunk field lines, is moved to a point of sale in practically every producing field from which long distance pipe lines purchase gas. The attempt by the Commission to draw fine lines of distinction as to the beginning and ending of the gathering activity, as to a sale which is "closely connected with and a part of local gathering," and one which is made immediately upon the completion of gathering, will not result in a reasonable and practical interpretation of this law as intended by Congress. The movement of gas within a single producing field from the well to the compressor station of an interstate pipe line company is either all gathering or it is not gathering. The sale there made either is protected from regulation as being a part of the production or gathering of the gas, or it is not so protected. The attempt to divide juris-

diction so that it will not exist over individual and so-called independent producers, yet will exist over sales made by larger operators on the theory that gathering changes to interstate transportation some place within the field, can only result in discriminatory regulation.

Here are local sales of gas moving from the well without compression to points of sale, with all possession surrendered by the producer in the field and with the purchaser performing many functions prior to the movement to other states. Irrespective of whether such a transaction under contemplation of law might be considered a sale in interstate commerce, we earnestly submit that the intention of Congress will be fulfilled only if this Court denies to the Commission jurisdiction over these sales.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 733

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, AND CITY OF BATON ROUGE, LOUISIANA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Commission (R. I. 55–86) are reported at 48 P. U. R. (N. S.) 267. The opinion of the Circuit Court of Appeals (R. II, 910–927) is reported at 156 F. 2d 949.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 3, 1946 (R. II, 928). A

petition for rehearing was denied on October 1, 1946 (R. II, 948). The petition for a writ of certiorari was filed on November 30, 1946. The jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, where a natural gas company makes sales in interstate commerce of natural gas for resale, to interstate pipe line companies in a producing field, after such gas (which is both produced and purchased) has been commingled, gathered, and transported in the same field into a pipeline known as a "header" and thence transported through such "header" to an extension thereof from which the sale takes place, such sales are exempt from the jurisdiction of the Federal Power Commission by reason of the language of Section 1 (b) of the Natural Gas Act to the effect that its provisions shall not apply to the production or gathering of natural gas.

2. Whether the Commission's order establishing a rate of 4.66¢ per thousand cubic feet for the sales in issue is confiscatory in that such sales price is less than the average price paid by petitioner for a portion of its purchased gas, even though the order allows the average cost of all

gas, both produced and purchased, and a fair return on a proper rate base.[1]

STATUTE INVOLVED

The relevant portions of the Natural Gas Act are set forth in Appendix A, *infra*, pp. 22–32.

STATEMENT

The proceeding before the Commission arose out of a complaint filed by the Louisiana Public Service Commission against petitioner on May 23, 1939, alleging that the rates charged by it for natural gas sold to utilities and municipalities for resale were unjust and unreasonable, and requesting an investigation and the fixing of fair and reasonable rates (R. I, 23–35). Petitioner filed an answer to such complaint denying the jurisdiction of the Commission (R. I, 36–43). The Commission, on December 5, 1939, on its own motion, instituted an investigation of all inter-

[1] We believe the questions stated by petitioner do not correctly set forth the issues involved. Petitioner also formulates questions as to whether the sales by it are in fact sales in interstate commerce (Pet. 4). These questions, first sought to be introduced after the adverse decision of the Court of Appeals, are irreconcilably in conflict with prior admissions of petitioner in its reply brief before the Commission (p. 18) and its brief in the Circuit Court of Appeals (p. 24) that the sales in question were sales in interstate commerce. Furthermore, they incorporate allegations contrary to the facts admitted at the hearing and contrary to the uncontested findings of the Commission. See below, pp. 14–16.

state wholesale rates and charges of petitioner (R. I, 50–52).

The complaint and the general investigation were consolidated for hearing (R. I, 52–54) and hearings were held at intervals during June and July of 1942 for a total of 8 days. Evidence was presented by petitioner, by the Louisiana Public Service Commission, by the cities of Baton Rouge and New Orleans, and by the Commission's staff. After submission of briefs and oral arguments before the Commission, the Commission, on April 27, 1943, issued its opinion and order hereunder review, finding (1) that petitioner was a natural-gas company within the meaning of Section 2 (6) of the Natural Gas Act and (2) that its interstate wholesale rates were excessive and should be reduced on and after May 15, 1943, by the amount of $1,100,345 as applied to the volumes as gas sold in the test year 1941 (R. I. 80, 86).

Petitioner accepted certain of the ordered reductions, but appealed so much of the order of the Commission reducing rates as pertained to sales to Mississippi River Fuel Corporation[2] at the latter's compressor station near Perryville, Louisiana (R. I, 82), to Southern Natural Gas Company[3] at the latter's compressor station, also near Perryville, Louisiana (R. I, 82), and to United Gas Pipe Line Company[4] for the account of

[2] Hereinafter referred to as Mississippi.
[3] Hereinafter referred to as Southern Natural.
[4] Hereinafter referred to as United.

Memphis Natural Gas Company[1] at Memphis' compressor station near Guthrie, Louisiana (R. I, 83), which the Commission had held excessive in the amount of $596,320. The dispute in this proceeding involves petitioner's sales of gas to the three companies above named.

The Petitioner.—Petitioner owns and operates a natural gas pipeline system, consisting of 110 natural gas producing wells in the Monroe Field, Louisiana, pipelines which gather gas produced from its own wells and purchased from other companies, and pipelines which transport such commingled produced and purchased gas in interstate commerce to various points of sale in Louisiana and Mississippi, including the points of delivery in the Monroe Field to Mississippi, Southern Natural, and United for the account of Memphis.

All of the commingled gas prior to delivery to the above purchasers by petitioner is brought to a point near Fowler, Louisiana, and then transported through its lines F–1 and F–44, which are what is known as "headers." Prior to the transportation of the gas through such "header" lines, the gathering of both produced and purchased gas has been completed, and no such activities occur on either line F–1 or F–44.

"Header" line F–1 and F–33A (a lateral connected to F–1) are utilized to make deliveries to

[1] Hereinafter referred to as Memphis.

Mississippi and Southern Natural at Perryville, and "header" line F–44 and F–43 (a lateral connected to F–44) are used for the delivery to United, for Memphis, at Guthrie (R. I, 142, 467; II, 573).[6]

The gas so transported and sold in interstate commerce to such companies continues its uninterrupted flow in interstate commerce for resale for ultimate public consumption in the States of Mississippi, Alabama, Georgia, Arkansas, Tennessee, Missouri, and Illinois.

The Rate Order.—The Commission in determining the reasonableness of petitioner's interstate wholesale rates, used 1941 as the test year. There is no dispute regarding the actual legitimate original cost of petitioner's property in service as of December 31, 1941, which was found to be $21,387,159 (R. I, 64). From this amount the Commission deducted $6,328,924 for depletion and depreciation (R. I, 64–67) and added $178,550 for construction work in progress (R. I, 70) and $347,202 for working capital. This resulted in a rate base of $15,585,975 "for the company's property as an assembled whole and an established gas utility in successful operation" (R. I, 65, 64, 70). On that rate base it computed a return of 6½%.

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[6] Interstate's "header" line F–1 is about 4 miles in length, F–44 is about 1.5 miles long, F–43 and F–33A are each less than a mile in length; see map, Appendix B (adapted from R. II, 599).

The Commission then determined the total cost of service (including return of 6½%) in the amount of $5,189,197. This cost was allocated to the sales subject to the jurisdiction of the Commission and to the unregulated sales in accordance with the "demand and commodity" method. Of the foregoing amount, $2,487,955 was determined to be the total cost of service (including return) applicable to all jurisdictional sales. The revenues from jurisdictional sales exceeded the cost of service (including return) by $1,375,777. (R. I, 75–76.) Such excess return was adjusted downward to take into account reduction in rates voluntarily made by petitioner between the date of the hearing and the issuance of the Commission order of April 27, 1943, so that the ordered reduction amounted to $1,100,345.

Petitioner disputes $596,320 of such reduction, the amount allocated by the Commission to the sales to the three companies mentioned above. Petitioner has accepted the balance of the rate reduction order and by so doing, has accepted by implication the rate base determination as well as the allocations of cost made by the Commission.

On May 13, 1943, petitioner applied for a rehearing of the Commission's order (R. I, 93–100) and, on June 9, 1943, the petition for rehearing was denied (R. I, 100–102). On June 14, 1943, a peti-

tion for review[7] was filed with the Circuit Court of Appeals for the Fifth Circuit (R. I, 11–18) which heard oral argument on May 13, 1946, and on August 3, 1946, affirmed the Commission's order (R. II, 910–928), Judge Waller dissenting. A petition for rehearing[8] was denied on October 1, 1946 (R. II, 948).

ARGUMENT

Petitioner here seeks a review of rate regulation questions which have been repeatedly considered by this Court and resolved adversely to the contentions now advanced by petitioner.[9]

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[7] By stipulation dated October 22, 1945 (R. I, 10–11), petitioner waived all points raised by the petition for review not based on alleged lack of the Commission's jurisdiction over petitioner's sales to Mississippi, Southern Natural, and United, for account of Memphis, by reason of the "production or gathering" provisions of subsection 1 (b), of the Natural Gas Act, and confined the points in issue to points 2, 3, 4, 29, 30 and 32 of the petition for review. Petitioner's brief in the Circuit Court of Appeals nevertheless raised an issue of confiscation as to the three sales here involved. Petitioner attempted to raise a further issue, in its petition for rehearing in the Circuit Court of Appeals, as to whether or not the sales in issue were sales in interstate commerce, which it had previously admitted. Cf. pp. 14–16, *infra*.

[8] Briefs in support of the petition for rehearing were filed on behalf of the State of Texas and on behalf of certain producing interests as *amici curiae* in the Circuit Court of Appeals, making the contention introduced by Interstate in its petition for rehearing, contrary to its previous admissions, that the sales in issue were not sales in interstate commerce.

[9] *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581; *The Peoples Natural Gas Company* v. *Federal Power Commission*, 127 F. 2d 153 (App. D. C.),

A. *The sales in issue are not exempt as production and gathering.*—Petitioner attempts to reopen the "production and gathering" issues under Section 1 (b) of the Natural Gas Act and to obtain an exemption thereunder for the sales of natural gas here in issue.

Petitioner ignores the case of *The Peoples Natural Gas Company* v. *Federal Power Commission*, 127 F. 2d 153, 155, certiorari denied, 316 U. S. 700, in which it was held by the United States Court of Appeals for the District of Columbia that sales of natural gas by Peoples to New York State Natural Gas Corporation immediately upon completion of production and gathering at the edge of the producing field, for transportation by the

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certiorari denied, 316 U. S. 700; *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591; *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U. S. 635; *Cities Service Gas Company* v. *Federal Power Commission*, 155 F. 2d 694 (C. C. A. 10), certiorari denied, Nov. 12, 1946 (No. 556, this Term); *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *United Fuel Gas Co.* v *Hallanan*, 257 U. S. 277. It is significant that petitioner nowhere cites or discusses the *Peoples Natural Gas Company* case, *supra*, which was relied upon by the court below on the "production and gathering" issues; nor does it mention the *Cities Service Company* case, *supra*, also relied upon by the court below, in which certiorari was denied by this Court on November 12, 1946 (No. 556, this Term), after an attempt by the Cities Service Company to reopen the "production and gathering" and other issues, which already had been "squarely met and conclusively decided" in the *Colorado*, *Interstate*, *Panhandle*, and *Hope* cases, *supra*.

purchasing company into New York State and resale there to ultimate consumers, were sales of natural gas in interstate commerce for resale subject to jurisdiction of the Commission and not exempt under Section 1 (b) of the Act as "production or gathering."[10] Further, the Court of Appeals (127 F. 2d at 155) disapproved the Commission's decision in the case of *In the Matter of Columbian Fuel Corporation*, 2 F. P. C. 200, 35 P. U. R. (N. S.) 3, relied upon by petitioner. Thereafter application was made to this Court for a writ of certiorari (No. 1234, Oct. T. 1941) and one of the two questions presented was the same "production and gathering" questions here presented.[11]

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[10] The contention of Peoples that the Commission had no jurisdiction over such sale was made in answer to the Order to Show Cause in the case filed in the United States District Court as Exhibit "1" to its Answer and Points in that court. Paragraph (1) (g) of the Answer alleged: "The sale of gas by Respondent to New York State Natural Gas Corporation involves only the production and gathering of natural gas, which activities are specifically exempt from regulation * * * under the Natural Gas Act; and such sale does not involve any transportation of natural gas in interstate commerce or the 'sale in interstate commerce of natural gas for resale for ultimate public consumption' within the contemplation of the Natural Gas Act."

[11] The question there stated was (Pet. 6):

"2. Is a local gas company, the property and operations of which are all within a single state, and whose business essentially and predominantly is the production and gathering of natural gas and its distribution to ultimate consumers, subject to the Natural Gas Act because it sells in

The contention has been repeatedly made in rate cases arising under the Natural Gas Act that the provisions of Section 1 (b) preclude the inclusion in the rate base of the cost of production and gathering facilities and the allowance in operating expenses of the cost of gas produced, but instead require the allowance of a fair price of the gas in the field.

This contention was first made and rejected in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 607. It was fully discussed, squarely met and conclusively decided by this Court in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 597,

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the producing field a small fraction of its surplus gas at the rate charged industrial consumers to another company which transports the gas, sometimes after storing it in the state of production and purchase, to another state for resale to ultimate consumers, the company first mentioned being regulated as to all of its business, including the sale to the second company, by the state in which it operates?"

Cf. also *Hartford Electric Light Company* v. *Federal Power Commission*, 131 F. 2d 953, 962 (C. C. A. 2), certiorari denied, 319 U. S. 741. See also legislative history of provisions in Sen. Rep. 1162, 75th Cong., 1st sess., accompanying H. R. 6586 and H. Rep. 709, 75th Cong., 1st sess., on the same bill, which was enacted as the Natural Gas Act. The legislative history relied on by petitioner (Pet. 29–35), relating as it does to a prior bill, H. R. 11662, containing different jurisdictional provisions, and not even reported by a Congressional committee, is entitled to no weight for the purposes for which it is cited. *United States* v. *Allen*, 179 Fed. 13, 19 (C. C. A. 8). Cf. *The Peoples Natural Gas Company* v. *Federal Power Commission*, 127 F. 2d 153, 159, certiorari denied, 316 U. S. 700.

and *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635, 648. In the petition for writ of certiorari in *Cities Service Gas Co.* v. *Federal Power Commission*, 155 F. 2d 694 (C. C. A. 10), No. 556, this Term, denied on November 12, 1946, a further unsuccessful attempt was made to reopen the question in this Court.

The Act clearly provides that a sale in interstate commerce of natural gas for resale for ultimate public consumption is a transaction to which the Act "shall apply" whereas the actual production or gathering of natural gas is an activity to which the provisions of the Act "shall not apply." To give effect to the whole, as the principles of construction require, the two activities must be interpreted as being mutually exclusive and not that the second nullifies the first. The regulation in the instant proceeding is over sales in interstate commerce for resale not the production or the gathering of gas. As this Court expressed it, "transportation and sale do not include production or gathering." *Canadian River Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 598.

In discussing this subject the court below very aptly stated that "petitioner's difficulties in construction and interpretation arise out of the fact that, treating unlike things as alike, it tries to read the exception with respect to production or gathering as an exception with respect to sales.

There is no warrant in the act for so doing." (R. 914.)

This Court stated in the *Canadian* case (324 U. S. at 602–3):

> We must read § 1 (b) in the context of the whole Act. It must be reconciled with the explicit provisions which describe the normal conventions of rate-making.
>
> That does not mean that the part of § 1 (b) which provides that the Act shall not apply "to the production or gathering of natural gas" is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like.

With respect to the legislative history of the Act, petitioner quotes at length from the testimony of Mr. Dozier DeVane, former Solicitor of the Federal Power Commission, in connection with the predecessor bill H. R. 11662 containing different jurisdictional provisions from that enacted. We do not contend that the legislative history of a predecessor bill may not be resorted to in a proper case, if necessary, as an aid to ascertaining the intention of Congress. It is submitted, however, that where, as here, the language of the Act is clear and the Committee reports on the final bill enacted are explicit on the questions at issue, statements of witnesses on

a bill not enacted and not even reported are entitled to no weight and that therefore the court below properly relied upon the legislative history of the final bill enacted. The statements of Mr. DeVane, however, when studied in the light of the actual facts as to H. R. 11662, not only do not support petitioner's contentions, but actually leave no doubt that sales of gas in interstate commerce for resale, even when made, as here, in the producing field, were intended to come within the jurisdiction of the Commission.

B. *The sales in issue are sales for resale in interstate commerce.*—The record in the present case leaves not the slightest doubt that the sales of natural gas in issue are, contrary to petitioner's present contention, sales of natural gas in interstate commerce.

Prior to the decision of the court below affirming the Commission's order, petitioner made no contention that the sales were not sales in interstate commerce. It was only then, in the petition for rehearing, that the contention was introduced into the case.

Petitioner did not make this contention before the Commission. In oral argument there petitioner's attorney expressly stated that he was not contending that the sales to Mississippi were not in interstate commerce (R. I, 477). In its reply brief before the Commission, at page 18, petitioner expressly admitted that all the sales in dispute are in interstate commerce.

The Commission, in its opinion (R. I, 60), stated that petitioner did not "deny that the sales of natural gas to the three pipe line Companies constitute sales of natural gas in interstate commerce for resale," and cited *Interstate Natural Gas Co.* v. *Public Service Commission*, 33 F. Supp. 50; 34 F. Supp. 980 (E. D. La.). As was pointed out by the court below, petitioner in that case successfully contended in the Federal Court that the sales to the pipe line companies in question were sales in interstate commerce and beyond the reach of the State Commission.[12]

The Commission also found in finding (9) of its order of April 27, 1943 (R. I, 83) that the gas "sold and delivered to the purchasers named in finding (7)," (those here involved) "moves in each instance in a constant flow from the mouths of the wells from which it is produced through pipe lines belonging to Interstate to the compressor

[12] By order dated April 28, 1942, *In the Matter of Interstate Natural Gas Company, Inc.*, Docket No. G-218, the Commission found that petitioner's rate schedule FPC No. 15 was a rate schedule for a sale for resale in interstate commerce. This rate schedule (Exhibit No. 11) is for the sale of gas to United Gas Pipe Line Company with delivery at petitioner's DeSiard compressor station situated near Fowler, Louisiana, approximately 2 miles nearer the wells than the points where the sales now in issue take place. There is no material difference in the character of the sale to United Gas Pipe Line Company at DeSiard and the sale and delivery to the same company for account of Memphis at the Guthrie station and the latter is no more a part of "production or gathering" than the former.

station of the respective purchaser, and thence through said compressor stations into the pipe line of said respective purchaser and thus into and through states other than Louisiana as described in finding (8), all without interruption, and said gas is so destined from the moment of its production." The Commission further found in finding (10) of the order that "the transportation and the sale of natural gas as described in finding (7) is, in each instance, the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses". Petitioner does not now contend that these findings of fact are not based upon substantial evidence; they are, therefore, conclusive. Section 19 (b), Natural Gas Act, *infra*, p. 31.

Unquestionably, under a long line of decisions by this Court, the sales in issue are sales in interstate commerce. *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277; *Missouri* v. *Kansas Gas Company*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *The Peoples Natural Gas Company* v. *Federal Power Commission*, 127 F. 2d 153, certiorari denied, 316 U. S. 700; *Illinois Gas Co.* v. *Public Service Co.* 314 U. S. 498; *Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U. S. 626; *Federal Power Commission* v. *Hope Natural Gas*

Company, 320 U. S. 591; *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61; *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953 (C. C. A. 2), certiorari denied, 319 U. S. 741; *Dahnke-Walker Milling Co.* v. *Bowdurant*, 257 U. S. 282; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *United States* v. *Reading Co.*, 226 U. S. 324. Cf. *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880; *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Stafford* v. *Wallace*, 258 U. S. 495, 516–19; *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469, 474.

C. *The Commission's order does not result in confiscation.*—Petitioner's claim that the Commission's order results in confiscation so far as the sales to Mississippi, Southern Natural, and United, for account of Memphis, are concerned (Pet. 4) is limited to specific contentions that the rate of 4.66¢ per Mcf fixed by the Commission's order under review is less than the average price paid by petitioner for a portion of the purchased gas in the Monroe Field. Petitioner alleges that confiscation results therefrom even though the order as a whole provides a fair return upon the rate base determined on a depreciated original cost basis (Pet. 41).

Petitioner's claim of confiscation with respect to the rate reduction order of April 27, 1943, is

a dubious one for it has accepted that part of the order which fixed the same rate—which resulted in an increase—for the sales at the DeSiard compressor station to United for transportation and resale at New Orleans.[13] Since petitioner operates an integrated pipeline system in which both produced and purchased gas are commingled in varying mixtures and the commingled mixtures are sold both to the interstate pipe line companies here involved and to United for the New Orleans market, the present claim of confiscation would apply equally to the sales to United for resale at New Orleans. However, petitioner has made no such claims and has accepted the reduced rate of 4.66¢ per Mcf. as just, reasonable and fully compensatory as to the New Orleans sales, while urging confiscation as to similar sales to Mississippi, Southern Natural and Memphis.

The Commission found that petitioner's total cost (before allocation between jurisdictional and nonjurisdictional business) of exploration, producing, purchasing, gathering, transporting, delivering and selling natural gas in the Monroe Field was $2,430,152.44 and that the average cost (including rate of return at 6½%) of the 52,-

[13] The sale of natural gas to United for resale at New Orleans at 3.68¢ per Mcf. was less than the 4.66¢ per Mcf. cost of such gas including a 6½ percent return. Petitioner charged Mississippi 8.31¢ per Mcf., Southern Natural 6.19¢ per Mcf., and Memphis 8.37¢ per Mcf. for the same kind of gas and service.

163,657 Mcf. delivered by petitioner from its Monroe Field system was 4.66¢ per Mcf.

This cost of 4.66¢ per Mcf. is the average of a number of costs, including an average of 2.72¢ per Mcf. for gas produced, 3.61¢ per Mcf. for gas purchased at the wellhead, 5.49¢ per Mcf. for gas purchased at central points in the field (the full purchase price in both cases) and 1.36¢ per Mcf. for gathering and other costs.[14]

There is no basis for assuming that the gas sold to any purchaser is either wholly produced or wholly purchased gas. What is sold in every case is a commingled mixture of produced and

[14] The Commission, theoretically could have determined one sales price for gas produced by petitioner, a second and separate sales price for gas purchased at the wellhead and a third and separate sales price for gas purchased by petitioner at central points. Under such a theoretical price arrangement, gas produced by petitioner would be sold for 4.08¢ per Mcf. (2.72¢ plus 1.36¢), gas purchased at the wellhead by petitioner would be sold for 4.97¢ per Mcf., and gas purchased at central points by petitioner would be sold for 5.49¢ per Mcf. The average price paid for all gas by each of the three pipe line companies under such a three-price arrangement would be exactly the same as ordered by the Commission or 4.66¢ per Mcf., if the percentage of the gas delivered from each of the three sources to each of the three pipe line companies was the same. Since the percentage of gas delivered from the three sources to each of the three pipe line companies varies from day to day, and hour to hour, and is never known positively, an average price of 4.66¢ per Mcf. to all three customers for the commingled mixture of the gas from the three sources is the only practical pricing arrangement and gives petitioner the same total revenue as if the three-price arrangement were used.

purchased gas. Petitioner accepts the order as non-confiscatory as to New Orleans sales and desires at the same time to claim that it is confiscatory as to the present sales, which should not be permitted. Moreover, it should not be allowed to single out the portion of the commingled gas which it claims is purchased gas and claim the rate is confiscatory as to that although as applied to all gas, on an average basis, it is just and reasonable. In any event, it is clearly established by decisions of this Court that the rate reduction order must be "viewed in its entirety." "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *Panhandle Eastern Pipe Line Co.*, 324 U. S. 635, 649; *Cities Service Gas Company* v. *Federal Power Commission*, 155 F. 2d 694, 699, certiorari denied Nov. 12, 1946 (No. 556, this Term).

In ascertaining whether petitioner's rates were reasonable, the Commission used the same method of rate fixing in this case as was used in the *Hope, Panhandle, Canadian River* and *Cities Service* cases, *supra*. Here, as in those cases, the Commission allowed all taxes, depletion and depreciation, exploration and development costs and all other operating expenses, including the cost of production and the total cost of gas purchased.

CONCLUSION

The decision below is correct and fully accords with the applicable decisions of this Court, which we have cited. There is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1946.

APPENDIX A

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821, 15 U. S. C. 717, *et seq.*, are as follows:

> SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
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> * * * * *
>
> SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas sub-

ject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the

Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference

thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or

contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

SEC. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an

inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

* * * * *

SEC. 9. (a) The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its

jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

* * * * *

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties, or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

* * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and

matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

* * * * *

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the

District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and

its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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